In The

Supreme Court of the United States

October Term, 1976

No. 76-930

DIXY LEE RAY, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Appellants,

v.

ATLANTIC RICHFIELD CO., ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Washington

BRIEF FOR THE COMMONWEALTH OF VIRGINIA, AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The State of Virginia is vitally concerned with the protection of the Chesapeake Bay, a body of water similar to Puget Sound in many respects. Both are fragile marine ecosystems representing a precious State resource. Both possess commercial, esthetic, recreational, and scientific values that are of incalculable benefit to the State's citizens. Both are extremely vulnerable to the disastrous effects of oil tanker spills. Increasingly, carriers of petroleum products

are transporting fuel oil, crude oil and LPG through the Chesapeake Bay in ever-expanding larger tankers. In view of such an interest, the Commonwealth of Virginia emphasizes the need for local regulations expressly tailored to protect State resources.

QUESTIONS PRESENTED

I. Whether a state statute exercising the historically recognized police power over inland waters is preempted by federal statutes which are both consistent with and promotive of state regulation?

II. Whether a state statute which is designed to safeguard a vital natural resource, and which minimally burdens interstate and foreign commerce, violates the Commerce Clause?

III. Whether a state statute which neither conflicts with any foreign treaty nor has any direct impact on foreign relations interferes with the federal power to make treaties and conduct foreign affairs?

SUMMARY OF ARGUMENT

I. At stake in this case is an historic state police power. Ever since *Cooley* v. *Board of Port Wardens,* 53 U.S. (12 How.) 299 (1851), the right of a state to regulate vessel traffic on its internal waters has enjoyed constitutional sanction; and Washington's Tanker Law is precisely this type of regulation. Whenever such police powers are threatened by a preemption challenge, this Court will find preemptive intent only in response to an "unambiguous congressional mandate," and preemptive conflict only where compliance with both state and federal law is a "physical impossibility." *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963). In the search for congressional intent, it is crucial to recognize the complexity of modern environmental legislation. It is not enough to examine one statute alone. Congressional intent can be accurately divined here only by examining the skein of overlapping federal water-related statutes which pertain to Puget Sound. Such an examination reveals that these statutes clearly do not preempt state regulation, rather, they invite it. As for conflicts between state and federal law, the antagonism must be actual, not merely potential. *Askew* v. *American Waterways Operators, Inc.,* 411 U.S. 325 (1973). In this case the alleged conflicts are potential at best. The District Court's ruling was thus premature, especially in light of the sensitive issues of federalism involved.

II. Traditionally, this Court has upheld certain classes of state regulations in the face of an argument that the regulations impermissibly burden interstate or foreign commerce. The Washington Tanker Law falls within the parameters of these classes, since it is concerned with public health and welfare, transportation, protection of the state's natural resources, and regulation of harbors and navigation. In addition, the statute satisfies the sliding-scale balancing test enunciated by the Court in cases such as *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970). This test requires that the regulation's benefits significantly outweigh the resulting burdens on commerce. When the burdens on commerce are minimal, and the benefits to the state are significant, the statute must be upheld. The scale is adjusted to favor the statute's validity when the interests protected by the statute are of the above-mentioned classes. Application of all these criteria demonstrates clearly that the Tanker Law does not violate the Commerce Clause of the Constitution.

III. Even though the Tanker Law includes foreign as

well as domestic vessels in its regulations, it does not infringe on the federal government's implicit power to conduct foreign affairs. It has long been recognized by this Court that states may regulate vessel traffic within the state's waters, even when the regulations incidentally affect foreign vessels. State statutes have been struck down as violative of the federal foreign affairs power only when they have "a direct impact upon foreign relations." *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968). Specifically, there is no evidence of any infringement of Canadian navigation rights caused by the Tanker Law. Nor does the statute violate the Constitution's exclusive grant of the treaty-making power to the federal government found in Article II, Section 2, Clause 2. Of the international treaties currently in force and ratified by the United States, none has suffered interference with its objectives as a result of the Tanker Law's operation.

ARGUMENT

I.

Washington's Tanker Law Has Not Been Preempted By Federal Law.

The issue of preemption, as framed by the facts of this case, requires recourse to two provisions of the United States Constitution. One, the Supremacy Clause (Article VI, Clause 2), provides:

> This Constitution, and the Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The other, the Tenth Amendment, states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

A resolution of these two provisions is the task faced by this Court: to determine whether Sections 2 and 3 of Washington's Tanker Law, enacted in the exercise of an historically "reserved" police power, are superseded by or conflict with federal regulation. If Congress clearly intended its regulatory control to be exclusive, or if state law irreconcilably conflicts with federal law, only then does the Supremacy Clause require preemption. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963).

A. Federal Regulation Of Puget Sound Was Not Intended To Be Exclusive.

Congressional intent to preclude state regulation of an activity covered by federal statute may be indicated by explicit statutory language. Alternatively, it may be inferred from (1) general statutory language and legislative history, (2) the pervasiveness of the federal scheme, (3) the need for uniform federal regulation, or (4) the interference by state law with a congressional purpose. *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143, 1146-1147 (8th Cir. 1971), *aff'd. mem.*, 405 U.S. 1035 (1972).

Under any of these tests, it is critical that preemption not be inferred except upon the most cogent and unequivocal evidence. For Washington's Tanker Law is more than simply state action: it is the exercise of a traditional state police power designed to protect the health and economic well-being of its citizens.

Whenever claims of federal exclusivity have threatened to displace traditional state powers, this Court has declined

to find preemptive intent without indisputable proof thereof:

> The settled mandate governing this inquiry, in deference to the fact that a state regulation of this kind is an exercise of the "historic police powers of the States," is not to decree such a federal displacement "unless that was the clear and manifest purpose of Congress," *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230. In other words, we are not to conclude that Congress legislated the ouster of this California statute by the marketing orders in the absence of an unambiguous congressional mandate to that effect. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 146-147 (1963).

The protection of natural resources has long been a recognized state police power. *See Manchester* v. *Massachusetts*, 139 U.S. 240 (1890); *Skiorotes* v. *Florida*, 313 U.S. 69 (1940). Even more impressive is the record of state regulation of waters. *E.g., Cooley* v. *Board of Port Wardens*, 53 U.S. (12 How.) 299 (1851); *The Steamboat New York*, 59 U.S. (18 How.) 223 (1855); *Packet Co.* v. *Catlettsburg*, 105 U.S. 559 (1881). The State of Washington is not an interloper in federal domain. It has merely availed itself of powers sanctioned by the weight of history.

In this respect, the present case stands in stark contrast to *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), and *Northern States Power Co.* v. *Minnesota, supra*. *City of Burbank* involved air traffic, a subject over which the federal government has exercised broad controls. Similarly, *Northern States* involved radioactive wastes, almost exclusively a matter of federal regulation. Clearly, deference to historic state police power was not appropriate in those cases; but it is central here.

Equally important is the purpose of Washington's Tanker Law. It is not a regulation designed merely for administrative convenience. *Cf. Sirrot* v. *Davenport*, 63 U.S. (22 How.) 227 (1859) (Alabama law requiring the registration of the names of steamboat owners conflicts with federal statutes). Washington has striven to protect a natural resource whose preservation is vital to the welfare of its citizens. *See* Pretrial Order ¶¶ 80-108. And whenever a state acts to protect its citizens in this manner, all presumptions weigh against a finding of preemption. *Kelly* v. *Washington*, 302 U.S. 1, 13 (1937).

It is especially noteworthy here that the Coast Guard vessel traffic regulations (which, should this Court affirm the judgment below, will be the sole protection for Puget Sound) are purely discretionary. Ports and Waterways Act of 1972 (PWSA), Title I, 33 U.S.C. § 1221. Hence a finding of preemption here will render Puget Sound as vulnerable as it is valuable. The enormity of this result fortifies the teaching of *Kelly* v. *Washington, supra*, that preemptive intent under such circumstances ought to be inferred, if at all, only with the utmost trepidation.

The tests for preemption, therefore, must not be applied in a vacuum. For the question here is not whether the states may encroach upon federal prerogatives: rather, it is whether federal statutes are to be construed to sweep away historic state police powers, except upon the most overwhelming evidence of congressional intent to do so.

With these principles in mind, we now turn to the tests for preemptive intent enumerated in *Northern States Power Co.* v. *Minnesota, supra* at 1146-1147:

1. *Whether Congress Has "Unequivocally And Expressly Declared" That Its Authority Is To Be Exclusive.*

Congress is certainly capable of expressing its will. Consider, for example, the following words from the Clean Air Act Amendments of 1970: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicle engines subject to this part." 42 U.S.C. § 1857f-6a.

Likewise, Congress provided in the Noise Control Act of 1972, that "no state or political subdivision thereof may adopt or enforce . . . any law or regulation which sets a limit on noise emissions." 42 U.S.C. § 4905(e)(1).

No comparable language appears in the PWSA; nor did the District Court purport to find explicit language of preemption.

In light of Congress' unhesitating use of express preemption language in the examples cited above, its failure to use such language in the PWSA is itself significant. It suggests, indeed, that a search for implied preemptive intent here may be somewhat akin to hunting for Lewis Carroll's elusive Snark.

2. *Whether Statutory Language Or Legislative History Imply Preemptive Intent.*

In the process of gauging congressional intent, the threshold question is where to look. Here the issue is whether Congress intended its regulation of inland waters to be exclusive. Obviously, therefore, the proper sources of congressional intent are all those federal statutes which are germane to inland waters—in particular, to water pollution, oil spills and estuaries like Puget Sound.

The Court below referred to the PWSA as a "comprehensive federal scheme." Yet, by restricting its analyses to the

PWSA, the Court ignored many of the relevant statutes. The issue of scope is especially critical in the environmental area, where federal laws assert overlapping jurisdictions. For instance, in the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. § 1451, *et seq.* protection and management of the coast may be impossible without concomitant regulation of offshore activities such as oil drilling or tanker movement. The federal "scheme" under the PWSA cannot be functionally divorced from federal programs in other water-related areas.[1]

Examination of these other statutes indicates that Congress has not forbidden to the states a role in water management; that, in fact, it both expects and welcomes their participation.

a. The Federal Water Pollution Control Act Amendments of 1972 provide that *"it is the policy of Congress to recognize, preserve and protect the primary responsibility of the States to prevent, reduce and eliminate pollution."* 33 U.S.C. § 1251. (Emphasis added.) And the FWCPA deals specifically with oil pollution in 33 U.S.C. § 1321. Again Congress provided, in express terms, that "[n]othing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State." 33 U.S.C. § 1321(o)(2). The control of oil pollution is clearly the primary responsibility of the states in our federal system.

b. Congress declared in the Coastal Zone Management Act of 1972 (CZMA), that *"the key to more effective protection and use of the land and water resources of the coastal*

[1] Consultation requirements, such as those in the CZMA, 16 U.S.C. § 1456(b), and in the PWSA, 33 U.S.C. § 1222(c), recognize the overlapping interdependence of federal water programs.

zone is to encourage the states to exercise their full authority over the lands and waters of the coastal zone." 16 U.S.C. § 1451(h). (Emphasis added.)[2] *See also* 16 U.S.C. § 1452 (b). As stated in S. Rep. No. 92-753, 92d Cong., 2d Sess. 5-6 (1972):

> *It is the intent of the Committee to recognize the need for expanding state participation in the control of land and water use decisions in the coastal zone. . . .* It is believed that the States do have the resources, administrative machinery, enforcement powers and constitutional authority on which to build a sound coastal zone management program. (Emphasis added.)

A clearer instance of an "unequivocal and express declaration" of intent is difficult to imagine. But it encourages, not discourages state participation.

c. Also pertinent to Puget Sound is the Estuarine Areas Act of 1968, in which Congress made its intent unmistakable:

> In connection with the exercise of jurisdiction over the estuaries of the Nation and in connection with the benefits resulting to the public, *it is declared to be the policy of Congress to recognize, preserve and protect the responsibilities of the States in protecting, conserving and restoring the estuaries in the United States.* 16 U.S.C. § 1221. (Emphasis added.)

d. Finally, we note the Deep Water Ports Act of 1974, 33 U.S.C. § 1501, *et seq.* While this Act does not bear squarely upon Puget Sound, its statement of national policy further refutes the suggestion that Congress intends to monopolize the regulation of coastal waters: "It is declared to

[2] The term "coastal waters" includes estuaries such as Puget Sound. 16 U.S.C. § 1453(b)(2).

be the purposes of the Congress in this chapter to . . . (4) protect the rights and responsibilities of States and communities to regulate growth, determine land use, and otherwise protect the environment in accordance with law." 33 U.S.C. § 1501(a).

Importantly, even the PWSA itself does not evince a clear preemptive intent. Admittedly, Title I does provide that "[n]othing in this chapter . . . prevent[s] a State or political subdivision thereof from prescribing for structures only higher safety standards than those which may be prescribed pursuant to this chapter." 33 U.S.C. § 1222(b).[3] Crucial here is the language in the statute referring to "higher . . . standards than those which may be prescribed." This section, in other words, requires two elements in order for any preemptive effect to take place. First the Coast Guard must have set safety standards, which Title I states are purely discretionary. 33 U.S.C. § 1221. Second, the state must set safety standards higher than those promulgated by the Coast Guard. Until the Coast Guard promulgates such regulations, however, there is no basis for comparison, so that the state standards cannot be "higher."[4]

The House Report on Title I does state that "[s]tate regulation of vessels is not contemplated." H.R. Rep. 92-563, 92d Cong., 1st Sess. 15 (1971). But this is only natural, since Coast Guard regulation, which is a condition precedent to

[3] Even assuming *arguendo* that the carefully limited language of § 1222(b) was construed as broadly preemptive, nevertheless this would affect only § 3(2) of the Tanker Law. And since § 3(2) contains a severable proviso waiving the safety standards, it is not preempted in any case.

[4] The Coast Guard has promulgated design standards pursuant to Title II, 46 U.S.C. § 391a. *See* 33 C.F.R., pt. 157; *see also* 41 Fed. Reg. 1479 (Jan. 8, 1976). But the language of § 1222(b) specifies "standards which may be prescribed *pursuant to this chapter.*" (Emphasis added.)

the arguable preemptive effect of § 1222(b), *was* contemplated. That, after all, was the purpose of Title I: *i.e.*, to permit Coast Guard regulation. Again, though, until conflicting Coast Guard regulations are issued, state law is to remain intact, as is clear from 33 U.S.C. § 1222(e):

> In determining the need for, and the substance of, any rule or regulation or the exercise of any other authority hereunder the Secretary shall, among other things, consider—
>
> * * *
>
> (6) existing traffic control systems, services and schemes.

Lastly, § 1222(b) also provides that "[n]othing contained in this title supplants or modifies any . . . federal statute or authority granted thereunder." This, then, brings us full circle; for it requires the recognition of the clearly non-preemptive language of the FWPCA, the CZMA, the Estuarine Areas Act of 1968, and the Deep Water Ports Act of 1974. Perhaps more importantly, § 1222(b) leaves intact "authority granted thereunder." In this regard, the CZMA merits particular attention, for this Act deals with the allocation of powers in our federal system. It provides, in effect, that the states shall have dominant planning and regulatory control over the waters here involved, upon federal approval of state programs, federal actions in these areas are to be "consistent" with state programs. *See* 16 U.S.C. §§ 1451, 1456(c).

On balance, the PWSA indicates apparent congressional intent *not* to preempt state law. And the other federal water management statutes pertaining to Puget Sound specifically encourage state participation. Thus the only reasonable conclusion is that Congress intended to share the control of

water pollution with the states. There is no preemptive intent here.

3. *Whether "The Pervasiveness Of The Federal Regulatory Scheme As Authorized And Directed By The Legislature And As Carried Into Effect By The Federal Administrative Agency" Implies Preemptive Intent.*

Although the Court below described the PWSA as "comprehensive," the use of this word does not necessarily imply preemptive intent. As this Court stated in *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405, 415 (1973):

> We reject, . . . the contention that preemption is to be inferred merely from the comprehensive character of the federal work incentives program. The subjects of modern social and regulatory legislation often by their nature require intricate complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem.

In that same year, this Court also upheld Florida's oil spill liability law even though the Federal Water Pollution Control Act included "a pervasive system of federal control over discharges of oil." *Askew* v. *American Waterways Operators, Inc.,* 411 U.S. 325, 330 (1973).

Moreover, as emphasized earlier, the powers of Title I of the PWSA are not mandated for implementation. A program which contains no statutory mandate, but only *discretionary* power to regulate in a "comprehensive" fashion, is not the type of federal program which is designed to preempt all state action. This is especially true under the facts of this case, where significant public welfare and safety considerations are involved.

Finally, the implementation of Title I by the Coast Guard is far from pervasive. The Coast Guard has established only a limited and relatively rudimentary system of vessel traffic control. *See* 33 C.F.R., pt. 161, subpart B. Contrast this with the blanket of sophisticated federal controls over air traffic:

> Federal power is intensive and exclusive. Planes . . . move only by federal permission, subject to federal inspection in the hands of federally certified personnel and under an intricated system of federal command. The moment a plane taxis onto a runway, it is caught up in an elaborate and detailed system of controls. *Northwest Airline, Inc.* v. *Minnesota,* 322 U.S. 293, 303 (1944), *quoted in City of Burbank* v. *Lockheed Air Terminal, Inc.,* 411 U.S. 624, 663 (1973).

The PWSA as implemented leaves many gaps. With this regulatory background—a background particularly crucial in light of its discretionary nature—the PWSA can hardly be called so "pervasive" as to compel a finding of preemptive intent.

4. *Whether The Subject Matter Regulated Demands "Exclusive Federal Regulation In Order To Achieve Uniformity Vital To National Interests."*

The waters of Puget Sound, being internal waters within the State of Washington, are of a type traditionally susceptible to diverse rather than uniform regulation. *Morgan's R.R. & Steamship Co.* v. *Louisiana,* 118 U.S. 455 (1885), which upheld Louisiana's maritime quarantine regulations, the Court declared:

> The matter is one in which the rules that should govern it may, in many respects, be different in different localities, and for that reason be better understood and

> more wisely established by local authorities. . . . "It belongs, also, manifestly, to that class of rules which, like pilotage and some others, can be most wisely exercised by local authorities, *and in regard to which no general rules applicable alike to all ports and landing places can be properly made." Id.* at 435-466, *quoting Packet Co.* v. *Catlettsburg,* 105 U.S. 559, 563 (1881). (Emphasis added.)

The PWSA recognizes the inherently divergent characteristics of, and perforce the divergent rules applicable to, internal waterways such as Puget Sound. *See* 33 U.S.C. §1222(e)(2)-(5).

Such waterways have been subject to concurrent federal-state jurisdiction ever since *Cooley* v. *Board of Port Wardens,* 53 U.S. (12 How.) 299 (1851). Accordingly, there is clearly no need for national uniformity sufficient to preempt all state regulations.

5. *Whether "State Law Stands As An Obstacle To The Accomplishment And Execution Of The Full Purposes And Objectives Of Congress."*

The purposes and objectives of Congress have been explicitly and succinctly enunciated in a number of federal statutes: the FWPCA, 33 U.S.C. §§ 1251, 1321(o)(2); the CZMA, 16 U.S.C. §§ 1451(h), 1452(b); the Estuarine Areas Act of 1968, 16 U.S.C. § 1221; and the Deep Water Ports Act of 1974, 33 U.S.C. § 1501(a)(4). These statutes not only authorize, but encourage state regulation.

It is particularly noteworthy that the State of Washington's Coastal Management Plan (to which the Tanker Law is related) has been approved by the Secretary of Commerce pursuant to the CZMA, 16 U.S.C. § 1456(b). This approval does not, in the words of the District Court,

"waive" preemption; but it does suggest that the Tanker Law is in harmony with federal purposes and objectives. In fact, upon the Secretary's approval, state policy became national policy. *See* 16 U.S.C. § 1456(c). The Tanker Law, then, can hardly be an "obstacle" to congressional objectives.

The search for congressional preemptive intent thus confirms the constitutional validity of Washington's Tanker Law. For there are no express words of preemption either in the PWSA or in the other relevant federal statutes. Rather, express language appears *welcoming* state regulation. The PWSA, as implemented, touches only upon limited areas in a field historically subject to concurrent jurisdiction. Indeed, jurisdiction is being exercised not just concurrently but cooperatively, through the CZMA.

In view of these facts; in view of the traditional character of state inland water regulation; in view of the critical importance of Puget Sound, both economically and ecologically, to the people of Washington; and in view of the discretionary nature of the PWSA—to find here the requisite "unambiguous congressional mandate" of preemption is not merely unwarranted, but singularly inappropriate.

B. The Tanker Law In Not In Conflict With Federal Statutes.

A conflict exists between state and federal law only when "compliance with both . . . is a physical impossibility." *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142-143 (1963). Furthermore, this conflict must be real, not merely anticipated. *Askew* v. *American Waterways Operators, Inc.,* 411 U.S. 325 (1973). As the Seventh Circuit observed recently, "in any case involving environmental legislation, it is actual conflict, not potential conflict that is

relevant." *Proctor & Gamble Co.* v. *City of Chicago,* 509 F.2d 69, 77 (7th Cir.), *cert. den.,* 421 U.S. 978 (1975).

Only if ARCO is presently caught between the physically irreconcilable demands of state and federal law does a preemptive conflict exist.

1. *Sections 3(1) And 3(2) Do Not Conflict With The PWSA.*

Neither the PWSA nor the Coast Guard regulations provide general authority for a vessel to navigate the waters of Puget Sound, nor do they forbid a state from barring certain types of vessel traffic. There is, therefore, no conflict between the "supertanker ban" in § 3(1) and the PWSA.[5]

Likewise, there is no conflict between § 3(2) and the PWSA. Notably, the design features in § 3(2) are less extensive than the smoke abatement requirements for vessels upheld in *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960), which provided no alternative means of compliance.[6]

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[5] The failure of the PWSA and Coast Guard regulations specifically to permit supertankers to enter into Puget Sound, or even to forbid states from doing so, is consonant with federal policy as expressed in the Deep Water Ports Act of 1974; *i.e.,* to provide offshore ports, thereby eliminating supertanker traffic in crowded port areas like Puget Sound. *See* S. Rep. No. 93-1217, 1974 *U.S. Code Cong. & Admin. News,* 7529, 7538. In addition, *de facto* federal policy regarding supertanker use is that they be employed on long-haul trips—from the Persian Gulf rather than on the Alaska run. *See* Federal Maritime Administration, *Final Environmental Impact Statement on Tanker Construction Program IV-153, IV-156* (May 30, 1973).

[6] The *Huron* case is squarely on point here. It is of no significance that the state law upheld in *Huron* may have had a different purpose from that of the federal statute. "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963).

Even assuming that these requirements do conflict with the PWSA, § 3(2) contains a proviso permitting vessels not otherwise in compliance to enter Puget Sound anyway, if accompanied by a tugboat escort.

This proviso is the proper focus here, for the Washington legislature expected it to be used extensively; indeed, exclusively. *See* 1975 *Senate Journal* 1332:

> My hope is that the net effect of this will be to require that oil tankers operating in the confines of the fairly limited area that we have in this bill in Puget Sound will have tug escorts; and it is really not the intent of the bill, . . . to redo the thinking of marine architects and marine engineers in redesign of all oil tankers.

ARCO has been shipping oil through Puget Sound in tankers that do not meet the Tanker Law's design standards ever since the Law became effective. (Pre-trial Order ¶¶ 13, 79). Thus, granting *arguendo* an irreconcilable conflict between these standards and the PWSA, compliance with both § 3(2) and federal law is still not a "physical impossibility," since ARCO can, and has, availed itself of the tugboat option. "[T]he proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware,* 414 U.S. 117, 127 (1973), *quoting Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963).

The Court below ruled that the Coast Guard's mere consideration of tugboat escorts under the discretionary provisions of 33 U.S.C. § 1221(3)(iv) preempts the tugboat option in § 3(2). *See* Department of Transportation, Coast Guard, *Final Environmental Impact Statement—Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade* (Aug. 15, 1975). This ruling was premature, for until the effective date of actual regulations, there can be no conflict. *Askew* v. *American Waterways Operators, Inc.,* 411 U.S. 325 (1973).

2. There Is No Conflict Between § 2 And 46 U.S.C. §§ 215, 364.

Once again, we note that preemption occurs only in the event of an *actual* conflict between state and federal law. *Askew* v. *American Waterways Operators, Inc., supra.* And the facts of this case present no such conflict.

Ostensibly, the state pilotage requirement in § 2 of the Tanker Law contradicts the federal pilotage requirements in 46 U.S.C. §§ 215, 364. However, no party caught between their apparently competing demands is before this Court. For ARCO has been *voluntarily* using state-licensed pilots on all tankers entering Puget Sound. (Pre-trial Order ¶ 74.)

It is well to remember that "even action which seems pregnant with possibilities of conflict may, as consummated, be wholly barren of it." *Rice* v. *Board of Trade of City of Chicago,* 331 U.S. 247, 255-256 (1947). An instance of genuine conflict should be awaited before resolving major issues of federalism. Consequently, the District Court's ruling on § 2, like its ruling on the tugboat proviso in § 3(2), was entirely premature.

II.

The Tanker Law Is A Constitutionally Permissible Exercise Of The State's Police Power, And Does Not Create An Improper Burden On Interstate Or Foreign Commerce.

It is clear that the case for federal preemption must fail. However, respondents attack the statute on two additional fronts which were not considered by the District Court: (A)

the Tanker Law constitutes an impermissible burden on interstate and foreign commerce, and (B) the statute conflicts with exclusive federal power to conduct foreign affairs.

A. The State Interests Which The Statute Seeks To Protect Are Compelling.

The value of the State interests involved in Washington's exercise here of its police power and the potential danger to those interests posed by oil pollution cannot be overemphasized. The State recently described the value of Puget Sound (together with the Columbia River) as being a mainstay of the State's "lifeblood":

> The total livability of the state is dependent primarily on the quantity and quality of these waters and their tributaries. Not only are they valuable for navigation, both commercial and recreational, but fish and wildlife use them for homes, food sources and resting areas. They are also of the greatest import for their scenic and aesthetic values. . . . It is fair to conclude that the environment of Washington State, including the essential character of its citizens, is determined largely by the condition of the Columbia River and Puget Sound and their associated waters.[7]

An extensive documentation of Puget Sound's significance is found in the record below. In sum, the waterway possesses commercial, esthetic, recreational, and scientific values beyond any economic calculation.

It is uncontested that these resources would be devastated by a spill of crude oil. The insidious effect of oil pollution on marine environments has been elaborately documented.

[7] From the first two paragraphs of the *amicus* brief submitted by the State of Washington in *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

See, e.g., Hearings Before the Senate Commerce Committee on Recent Tanker Accidents, Jan. 11 and 12, 1977, part I (statement of the Natural Resources Defense Council, Inc.). Recognizing the dangers of oil pollution, the state has decided to exercise its police powers in an effort to protect its most precious resources by checking the pollution at its greatest potential source: oil tankers.

Washington State's fears of a tanker spill devastating Puget Sound are eminently justified in light of the rash of accidents occurring after the District Court's decision. Between the months of December, 1976 and April, 1977, there have been fifteen tanker accidents in or near Amerian waters. In the last two weeks of December alone, these accidents resulted in the spillage of eight million gallons of oil. Costello, *Tanker Safety,* Editorial Research Reports 167 (March 4, 1977).

Significantly, the above accidents involved primarily conventional-size tankers; and supertankers of the class regulated by the Tanker Law are considered to possess an even greater potential for mishap than the conventional ships. One commentator has observed that as tankers get bigger, "so do their problems." They "get bigger and more technical and difficult to handle, and as they simultaneously set afloat upon the waters quantities . . . of dangerous and damaging substance, they are being sailed by unskilled or improperly trained or uncaring men whose minimal terms of employment are part of the basis of a profit for the shipowners and operators." The marine ecology cannot be expected to survive these superships if they "continue to be built and to be operated and sailed by the sort of standards that now largely prevail." Mostert, *Supership,* 326 (1974).

The maneuverability and speed control of a supertanker is unquestionably more limited than that of a standard tanker. Such a fact takes on added significance when one

considers that the route through Puget Sound primarily used by tankers serving the ARCO refinery is one of the narrowest commercial shipping channels in the Sound. In addition, the Sound is subject to weather extremes that often render it unusually hazardous for shipping. To all these factors must be added the amount of oil that potentially could be spilled in the event of an accident. A 120,000 DWT tanker has the capacity to carry approximately 34,500,000 gallons.

In view of an oil tanker's potential capacity for spillage and the recent incidents of accidents; in view of the increased potential danger of supertankers; and in view of the valuable resources that would be destroyed by an oil spill, it is clear that the State of Washington has a vital interest in regulating tanker traffic in Puget Sound. The Tanker Law serves this vital interest.

B. The Tanker Law Is The Type Of State Action Traditionally Favored Against Commerce Clause Attacks.

The primary purpose for including the Commerce Clause in the Constitution was to check or eliminate the economic discrimination among the states that had been so rampant under the Articles of Confederation. *See, e.g., Baldwin* v. *Seelig,* 294 U.S. 525, 533-35 (1949). In accordance with this purpose, the Court has frowned upon state enactments which pressure out-of-state business to locate within the state, or which confer special economic benefits on native business at the expense of out-of-state business. Note, *State Environmental Protection Legislation and the Commerce Clause,* 87 Harv. L. Rev. 1762, 1773-75 (1974). The Tanker Law does not keep company with such disfavored legislation. The legislative motive for enacting the Law was environmental protection, not economic discrimination against other states. In addition, the cost of compliance

with the statute will be absorbed primarily by Washington's own residents, since nearly two-thirds of the oil imported in the State is consumed by its own residents. (¶ 20.) These factors indicate that the Tanker Law is not among those types of legislation which the Court traditionally has disfavored.

It is conceded that the statute affects interstate commerce. However, the *Cooley* doctrine instructs us that such an effect is permissible in a broad range of state regulations dealing with local concerns. *Cooley* v. *Board of Port Wardens, supra.* The Court there upheld the power of a state to require that a Pennsylvania-licensed pilot be used when a ship navigates Pennsylvania waters. Even though the regulation incidentally burdened interstate commerce, it was permissible because Congress had not preempted it, and the subject matter was such that "it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits." 53 U.S. at 340.

Subsequent to *Cooley,* the courts have carved out various enclaves of state regulations which have been permitted in spite of their incidental restrictions on interstate and foreign commerce. Among these enclaves are several that are relevant for our consideration.

1. Public health and welfare concerns are favored. *See e.g., Huron Portland Cement Co.* v. *City of Detroit, supra,* (city's smoke control ordinance as applied to vessels engaged in interstate commerce); *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424 (1963) (state ban on price advertising by optometrists).

2. State regulations designed to protect the state's natural resources are also favored. *See, e.g., Cities Services Gas Co.* v.

Peerless Co., 340 U.S. 179 (1950) (state conservation measure fixing the the price of natural gas). *Manchester* v. *Massachusetts, supra* (state programs protecting wildlife and fisheries interests).

3. State statutes regulating harbors and docking facilities have been upheld. *See, e.g., Clyde Mallory Lines* v. *Alabama,* 296 U.S. 261 (1935) (state regulation of harbor traffic); *Cooley* v. *Board of Port Wardens, supra* (regulation of river and harbor navigation).

4. Finally, state transportation regulations have been upheld. *See, e.g., South Carolina Highway Department* v. *Barnwell Bros.*, 303 U.S. 177 (1938) (ban on certain size of trucks from state highways); *Bradley* v. *Public Utilities Commission of Ohio,* 289 U.S. 92 (1933) (state ban on truck use of specific highway).

Even a cursory analysis reveals that the Tanker Law falls within these categories. It is clearly an enactment designed to preserve the health and welfare of Washington's citizens by preventing oil pollution and consequent destruction of a valuable state natural resource, Puget Sound. The statute seeks to attain this goal by promoting harbor safety through regulation of maritime transportaion.

However, we do not rely simply on a categorization or pigeonholing of the Tanker Law to support its validity in the face of a Commerce Clause attack. The statute must, and does satisfy the balancing test articulated most clearly in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). The Court there stated that "the extent of the burden [on interstate commerce] that will be tolerated will, of course, depend on the nature of the local interest involved. . . ." 397 U.S. at 142. Let us proceed to apply this test and weigh the Tanker Law's burdens on commerce against the benefits to the state.

C. Alleged Burdens On Commerce Are Negligible.

Respondents first argue that the § 3(1) prohibition against tankers of greater than 125,000 DWT imposes an impermissible burden on interstate commerce. At the outset, we must note that tankers smaller than 125,000 DWT are perfectly capable of supplying the ARCO refinery in Puget Sound, and do so today. However, respondents claim that these smaller tankers are not as economically efficient as supertankers. The record contains no facts either directly supporting this assertion or refuting the argument that the economy of scale is asymptotic. The State Oceanographic Commission's estimates tend to support the "asymptote" argument, *i.e.*, that there is a point where the predicted economies will be so small that the building of a larger ship to achieve them is not justifiable, and that this point is reached near the 125,000 DWT size.

Some additional facts must here be emphasized. First, Washington has not barred supertankers from *all* its waters, but only from a certain portion of them, namely Puget Sound. Second, the record is bare concerning ARCO's assertion that § 3(1) has *disrupted* ARCO's shipping activity. Third, the record is also devoid of any proof that the supertanker ban has had any effect at all on respondent Seatrain's ability to sell the two supertankers it is currently building. Given the above-noted failures of respondents to bear their burden of persuasion, we must conclude that § 3(1) does not burden interstate commerce.

A further argument of respondents is that § 3(2) of the Tanker Law places an unreasonable burden on commerce by means of the structural design requirements and the alternative tug escort requirement. We shall omit discussion of the design requirement's burdens, since those requirements are not mandatory. The Washington legislature expected that

the operative alternative would be the tug escort, and respondent ARCO has chosen to comply with that alternative. 1975 *Senate Journal* 1332.

The cost of a tug escort is extremely small relative to the total cost of refining and transporting oil. Furthermore, as the State of Washington argued so cogently to the District Court, it is not clear that even the minuscule tug cost would increase the net cost of petroleum products. As the Acting Chief of the Coast Guard's Office of Merchant Marine Safety stated: ". . . the transportation costs are a relatively small part of the price consumers pay today" for oil products. *Notice of Proposed Rule Making,* 41 Fed. Reg. 19672 (May 13, 1976). In addition, compliance with the tug escort safety provision reduces the likelihood of ARCO being held liable for oil spill damages caused by a tanker accident. Respondents have failed to demonstrate anything more than a *negligible* burden on interstate commerce caused by the tug escort provision.

An additional burden on commerce allegedly created by the Tanker Law is the possibility that conflicting state statutes will proliferate in this area. Such a burden is purely speculative, and, as such, cannot be included in our calculus of burdens and benefits. The Seventh Circuit recently stated (citing *Huron Portland Cement Co., supra* at 448): "The Supreme Court has indicated that in a case involving environmental legislation it is *actual* conflict, *not potential* conflict, that is relevant. *Proctor and Gamble Co.* v. *City of Chicago, supra* at 77. No actual conflict exists.

Respondents finally claim that commerce with foreign nations has been unconstitutionally burdened by the Tanker Law. Such alleged burdens are essentially the same as those of interstate commerce, shown above to be negligible. In addition, the record presents no evidence that oil tankers calling at or departing from Canadian ports have run afoul

of the statute. The record is also bare of any evidence that tankers greater than 125,000 DWT have ever called at any of the four Vancouver refineries. The flow of foreign commerce has not been impeded any more than has been interstate commerce. We have demonstrated above that the burdens on interstate commerce are either negligible or nonexistent.

D. Benefits Of The Statute Far Exceed Its Burdens.

Given that the Tanker Law's burden on commerce have been shown to be slight, the statute must be upheld if its benefits to the state outweigh the negligible burdens on commerce. The Court has recently reiterated that it uses a sliding scale in making such determinations based on the Commerce Clause, and that the scale is adjusted according to the nature of the case. *Great Atlantic and Pacific Tea Company* v. *Cottrell,* 424 U.S. 366, 369 (1976). As discussed earlier in this brief, the Court favorably regards certain areas of state regulation, most significantly for our purposes, public health and welfare concerns; preservation of the state's natural resources; transportation concerns; and harbors and navigation regulations. As was also discussed earlier, the Tanker Law falls within the parameters of these subject areas. For this reason, the statute should be weighed on a scale balanced to favor the enactment's validity.

Respondents contend that the scales should be upset because the state has not demonstrated that the statute is the "least restrictive alternative" to achieving the state's goal. This contention must be disregarded. It is respondents, as challengers of the statute, who must bear the burden of proving that a less restrictive alternative exists. Note, *State Environmental Protection Legislation and the Commerce Clause,* 87 Harv. L. Rev. 1762, 1781 (1974). Respondents

have not borne their burden in this case. The record does not contain facts sufficient to show that Washington's environmental goals could be achieved by means less restrictive than the Tanker Law.

Weighed on a scale balanced in favor of the statute's validity, as required by the Court's past decisions, the Tanker Law weathers the storm of a Commerce Clause attack. The minimal or speculative burdens on interstate and foreign commerce are clearly outweighed by the statute's compelling environmental benefits to the people of Washington. The State's exercise of its police power here is valid.

III.

The Tanker Law Creates No Conflict With The Federal Power To Make Treaties And Conduct Foreign Affairs.

As demonstrated in Part I, the Tanker Law has not been preempted by any federal action in this field and particularly not by any Congressional intent to regulate oil tankers solely by means of international agreements. In Part II it was demonstrated that foreign commerce is not impermissibly burdened by the statute's operation. Respondents, however, press further the statute's alleged international implications, claiming that the regulations conflict with the federal government's Article II treaty-making power, and with the implicit federal power to conduct foreign affairs.

A. Canadian Navigation Is Not Hindered By The Tanker Law.

Respondents imply that there exists some absolute right of innocent passage to and from the British Columbia ports. The experts in international law disagree with such an implication. Professor Jessup states: ". . . it may be said that

the right of innocent passage does not guarantee to the vessel exercising it a total immunity from the processes of the local laws." Jessup, *The Law of Territorial Waters and Maritime Jurisdiction,* 122 (1927). (Emphasis added.) Professor O'Connell concurs: "The [right of innocent passage] is, however, subject to local regulations relating to pollution, pilotage, navigation, and protection of buoys and cables, etc., and even customs and public health." O'Connell, 2 *International Law,* 688 (1965). These rules were recognized by the Senate Commerce Committee during its deliberations on the PWSA. The right of innocent passage was not considered to be impeded by "maritime regulations which contribute to the safety of navigation or are of a sanitary or police character." S. Rep. No. 92-753, 92d Cong. 2d Sess., 2794 (1972).

In addition, no rights of navigation protected by British-American treaties are violated. Respondent focuses on two of those treaties. The first, Treaty with Great Britian in Regard to Limits Westward of the Rocky Mountains, 9 Stat. 869, contains a provision in its first Article that "the navigation of the whole of the said channel and straits, south of the forty-ninth parallel of north latitude, remain free and open to both parties." However, no authority lends credence to respondents' contention that the "free and open" language must be construed as prohibiting regulation of navigation. On the contrary, the diplomatic history evidences a British willingness to permit regulation. Merk, *The Oregon Question,* 253 (1967). Such intent is also displayed by past British acquiescence in Washington State regulations of pilotage and other matters incidentally touching Canadian navigation. The British concern was primarily that Puget Sound navigation not be regulated in such a manner as to discriminate economically against non-American shipping. Merk, *id.*

The second British-American treaty about which respondents are concerned is the Treaty with Great Britian Relating to Boundary Waters Between the United States and Canada, 36 Stat. 2448. There is clearly no conflict here with the Tanker Law because the treaty describes navigational rights in "boundary waters." This term "boundary waters" has been understood to include only fresh waters. Bloomfield and Fitzgerald, *Boundary Water Problems of Canada and the United States,* 17 (1958).

Thus, the statute creates no impermissible interference with Canadian navigation rights as delineated by treaties and by the recognized right of innocent passage.

B. Other International Treaties And Agreements Are Not Impaired.

Respondents suggest that the Tanker Law interferes with other treaties to which the United States is a party. Of the treaties which present the greatest potential for conflict with the statute, not all are currently in force. With regard to those actually in force, the Law does not impede the accomplishment of their purposes. A few examples will suffice to illustrate the point:

1. The International Convention for the Safety of Life at Sea, 1960, 16 U.S.T. 185, T.I.A.S. 5780, 536 U.N.T.S. 27, deals with the safety of human life aboard ships, not with preventing oil spills.

2. The International Regulations for Preventing Collisions at Sea, 1960, 16 U.S.T. 794, T.I.A.S. 5813, revised 1972, attempts to reduce the likelihood of collisions. The Tanker Law's regulations *promote* rather than hinder such a goal.

3. The International Convention for the Prevention of Pollution of the Sea By Oil, 1954, 12 U.S.T. 2989, T.I.A.S. 4900, 327 U.N.T.S. 332, with 1963 Amendments, specifically states that subscribing nations are not prohibited from acting within their own jurisdiction to regulate discharges of oil within 50 miles of Land.

It is evident that the Tanker Law does not interfere with the objectives of any international treaties currently in force which the United States has ratified.

C. Federal Power To Conduct Foreign Affairs Remains Undiluted.

The Court recently has reiterated its policy of upholding state enactments which incidentally affect foreign affairs. *DeCanas* v. *Bica,* 424 U.S. 351 (1976). The Court has disapproved of state statutes affecting foreign policy only in cases where the statute has "a direct impact upon foreign relations." *Zschernig* v. *Miller,* 389 U.S. 429, 441 (1968). Respondents have shown no such "direct impact," and the Law clearly does not usurp the federal government's power to formulate American foreign policy.

What the Tanker Law seeks to accomplish is simply to regulate vessel traffic within the state's waters. Such a goal has traditionally been recognized as a local prerogative, even when it affects foreign vessels. Chief Justice Taney long ago recognized that ". . . every vessel, from whatever part of the world she may come, is bound to take notice of [local regulations] and conform to them." *The James Gray* v. *The John Fraser,* 62 U.S. (21 How.) 184, 187 (1858). The principle was later reiterated: "Port regulations are supposed to be known to the shipowner before he sends his vessel on the voyage, and the general rule is that in sending her to any particular port he elects to submit to the lawful regu-

lations established at that port. . . ." *The Merrimac,* 81 U.S. (14 Wall.) 199, 203 (1871).

The Tanker Law, although touching upon the conduct of foreign affairs, does so in a way that has traditionally been permitted by this Court. Consequently, the statute in no way infringes upon the federal government's treaty power to conduct foreign affairs.

CONCLUSION

For the reasons stated herein, the decision of the Three-Judge District Court should be reversed.

Respectfully submitted,*

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